

OPEN MEETING AGENDA ITEM

ORIGINAL



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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2010 DEC -8 P 2:39

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

DEC 8 2010

EXCEPTION

DOCKETED BY

R. Stump

IN THE MATTER OF THE APPLICATION
OF ARIZONA WATER COMPANY, AN
ARIZONA CORPORATION, TO EXTEND
ITS EXISTING CERTIFICATE OF
CONVENIENCE AND NECESSITY AT
CASA GRANDE, PINAL COUNTY,
ARIZONA.

DOCKET NO. W-01445A-03-0559

EXCEPTIONS OF CORNMAN
TWEEDY 560, LLC

On November 29, 2010, the administrative law judge ("ALJ") issued a Recommended Opinion and Order (the "Remand ROO") in the remand phase of the above-captioned case affirming the grant of a certificate of convenience and necessity ("CC&N") to Arizona Water Company ("AWC") pursuant to Decisions 66893 and 69722 for property owned by Cornman Tweedy 560, LLC ("Cornman Tweedy"). While the Arizona Corporation Commission ("Commission") unequivocally ordered a review "broad in scope so that the Commission may develop a record to consider the overall public interest underlying service to the Cornman property that is included in the extension area granted by Decision No. 66893," and while Cornman Tweedy in fact presented substantial evidence (unrebutted in many instances) addressing why the public interest requires that its property be excluded from AWC's CC&N, the ALJ erroneously concluded that the Commission may only remove property from a CC&N if it finds that AWC "is unwilling or unable to serve the property at a reasonable cost to customers."¹ Cornman Tweedy hereby files its exceptions to the Remand ROO, and requests that the Commission modify the ROO to exclude Cornman Tweedy's property (the "Cornman

¹ ROO at Finding of Fact ("FOF") 160.

1 Tweedy Property") from AWC's CC&N, based upon the public interest and the
2 evidentiary record in this case.

3 **I. INTRODUCTION.**

4 Despite the lengthy procedural history of this case, the issues to be addressed are
5 simple and are clearly set forth by the Commission in Decision 69722 issued July 30,
6 2007. In ordering this remand proceeding, the Commission stated:

7 After considering the evidence in this matter, we are concerned that there
8 may not be a current need or necessity for water service in the portions of
9 the extension area that are owned by Cornman. We also recognize that
10 Cornman does not wish to have its property included in Arizona Water's
11 CC&N at this time. We believe that these issues bear further examination
12 and that they may have some relevance to the best interests of the area
ultimately to be served.

13 * * *

14 [R]egarding the property that is owned by Cornman, we would like an
15 opportunity to consider the overall best interests of the Cornman area and
16 of the public. We will therefore reopen the record in this matter pursuant
17 to A.R.S. §40-252 and remand this case to the Hearing Division for further
18 proceedings regarding whether Arizona Water should continue to hold a
19 CC&N for the Cornman extension area at this time.²

20 Based upon the express direction of the Commission in ordering this remand
21 proceeding, the issues to be adjudicated regarding the "overall best interests of the
22 Cornman area and of the public" included the following:

23 1. Is the public interest best served by a Commission preference for
24 integrated water and wastewater providers over stand-alone water providers such as
25 AWC;

26 2. Is there a current need and necessity for water service for the
27 Cornman Tweedy Property;

28 3. What weight should be accorded the fact that Cornman Tweedy
does not wish to have its property included within the CC&N of AWC (*i.e.*, there is no
request for utility service pending); and

² Decision 69722 at p. 4, lines 1-5 and lines 12-16.

1 4. Does it serve the overall public interest for AWC to possess a
2 CC&N for the Cornman Tweedy Property.

3 The evidence that Cornman Tweedy presented through its witnesses via pre-filed
4 testimony and its legal briefs go directly to these issues.³ Based upon this evidence,
5 much of which is uncontroverted by AWC, the Commission should amend Decisions
6 66893 and 69722 to exclude the Cornman Tweedy Property from AWC's CC&N.

7 **II. BACKGROUND.**

8 In Decision 66893 (April 6, 2004), the Commission conditionally approved the
9 extension of AWC's CC&N to include approximately 11 square miles in Pinal County,
10 Arizona (the "Conditional Extension Area"). Included in the Conditional Extension Area
11 are 1,138 acres now owned by Cornman Tweedy (the "Cornman Tweedy Property").
12 The Cornman Tweedy Property constitutes approximately one-half of a contiguous 2,344
13 acre tract referred to as EJR Ranch that was to be developed as a master-planned
14 development. More than one half of the EJR Ranch property is within the CC&N of
15 Cornman Tweedy's affiliate, Picacho Water Company, and is contiguous to the
16 Conditional Extension Area. All of the EJR Ranch property is within the sewer CC&N
17 of Cornman Tweedy's affiliate, Picacho Sewer Company. Picacho Water Company and
18 Picacho Sewer Company are operated as an integrated water-wastewater utility.

19 Decision 66893 was conditioned upon AWC filing copies of certificates of
20 assured water supply and main extension agreements for Florence Country Estates (a
21 240-acre parcel now owned by Cornman Tweedy and included as part of the Cornman
22 Tweedy Property) and Post Ranch (a 480-acre parcel owned by Harvard Investments)⁴
23 within 365 days of Decision 66893, or by April 6, 2005.⁵ Pursuant to the ordering
24 language of Decision 66893, if AWC failed to satisfy these conditions within the
25

26
27 ³ Cornman Tweedy incorporates herein the legal analyses and arguments set forth in the pleadings that it
has previously filed in this docket.

28 ⁴ Decision 66893 at FOF 11 and 12.

⁵ *Id.* at FOF 9 and p. 7, lines 1-6.

1 specified time, then the decision was to be "deemed null and void without further order
2 of the Arizona Corporation Commission."⁶

3 As the compliance deadline approached, AWC had not satisfied either of the
4 conditions, and on March 30, 2005 (only one week before the expiration of the deadline),
5 AWC filed a Request for Additional Time to Comply with Filing Requirements of
6 Decision 66893 (the "Extension Request") asking for an additional 365 days to comply
7 with the conditions. On June 12, 2007, the ALJ issued a recommended opinion and
8 order ("ROO") which found that AWC had complied with the conditions imposed in
9 Decision 66893, a finding which Cornman Tweedy contested. The ROO was scheduled
10 for consideration by the Commission at its June 26-27, 2007 Open Meeting.

11 On June 21, 2007, Cornman Tweedy filed exceptions to the ROO requesting that
12 the Commission exclude the Cornman Tweedy Property from the area conditionally
13 granted in Decision 66893. On June 22, 2007, former Chairman Gleason docketed
14 Gleason Proposed Amendment #1 which, if adopted, would have excluded the Cornman
15 Tweedy Property from the area conditionally granted in Decision 66893. At the June 26-
16 27 Open Meeting, there was extensive discussion among the Commissioners, the ALJ,
17 and the Legal Division regarding whether the Commission could adopt Gleason
18 Proposed Amendment #1 without subjecting the Commission to a potential claim by
19 AWC that the Commission failed to provide procedural due process. Specifically, the
20 Commission discussed whether AWC had received adequate legal notice that it could
21 lose a portion of the CC&N area conditionally granted in Decision 66893. As a result of
22 the discussion, the Commissioners elected not to vote on the ROO at that open meeting
23 in order to have more time to consider Gleason Proposed Amendment #1 and to consider
24 possible alternative amendments that would eliminate any due process concerns.

25 The ROO was thereafter rescheduled for consideration at the July 24-25, 2007
26 Open Meeting. On July 19, 2007, Chairman Gleason docketed Gleason Proposed
27

28 ⁶ *Id.* at 7, lines 7-9.

1 Amendment #3 which contained the following language that was subsequently adopted
2 and incorporated into Decision 69722:

3 After considering the evidence in this matter, we are concerned that there
4 may not be a current need or necessity for water service in the portions of
5 the extension area that are owned by Cornman. We also recognize that
6 Cornman does not wish to have its property included in Arizona Water's
7 CC&N at this time. We believe that these issues bear further examination
8 and that they may have some relevance to the best interests of the area
9 ultimately to be served.

10 We also recognize that the proceeding before us is limited to relatively
11 narrow issues: whether, for purposes of compliance, Arizona Water
12 should be granted an extension of time to fulfill the conditions of
13 Decision No. 66893 and whether, in fact, those conditions have been
14 fulfilled. We have concluded that these conditions have been fulfilled,
15 and we therefore recognize that, by the terms of Decision No. 66893,
16 Arizona Water holds a CC&N for the extension areas at issue in this
17 proceeding.

18 Nonetheless, regarding the property that is owned by Cornman, we would
19 like an opportunity to consider the overall best interests of the Cornman
20 area and of the public. We will therefore reopen the record in this matter
21 pursuant to A.R.S. §40-252 and remand this case to the Hearing Division
22 for further proceedings regarding whether Arizona Water should continue
23 to hold a CC&N for the Cornman extension area at this time. We
24 recognize that Arizona Water, as the CC&N holder, is entitled to
25 appropriate notice and an opportunity to be heard. We therefore
26 officially place Arizona Water on notice that our subsequent proceeding
27 on remand will be for the purpose of considering whether the Cornman
28 property should be deleted from the CC&N extension granted to Arizona
Water by Decision No. 66893. The Hearing Division is directed to
conduct further evidentiary proceedings in this matter, including
appropriate opportunities for intervention and an appropriate opportunity
for Arizona Water to present its case.

While the matter currently before us presented relatively narrow issues,
we view the proceeding on remand as broad in scope so that the
Commission may develop a record to consider the overall public interest
underlying service to the Cornman property that is included in the
extension area granted by Decision No. 66893. By identifying these
issues and requiring further proceedings, we are not prejudging this

1 matter in any way; instead, we merely desire an opportunity to consider
2 the broader public interests implicated herein.⁷

3 At the July 24-25 Open Meeting, there was extensive discussion regarding
4 whether Gleason Proposed Amendment #3 would fully resolve any legal concerns
5 regarding proper notice to AWC, and whether remanding the proceeding under A.R.S.
6 § 40-252 to permit the broader public interest discussion the Commissioners desired was
7 the best way to achieve the Commissioners' objectives. Cornman Tweedy urged the
8 Commission that the law would permit the Commission to simply expand the scope of
9 the prior proceeding regarding AWC's request to extend the compliance deadlines in
10 Decision 66893 and remand the matter for additional evidentiary hearings on the broader
11 public interest issues. However, concerns persisted that such a course of action might
12 not comport with the Commission's notice requirements, thereby subjecting the
13 Commission to a legal challenge by AWC. Ultimately, the Commission adopted
14 Gleason Proposed Amendment #3 and it was incorporated into Decision 69722.

15 The Commissioners' extensive discussions at two Open Meetings, the adoption of
16 Gleason Proposed Amendment #3, and the plain language of Decision 69722 itself leave
17 no doubt that the Commissioners intended this remand proceeding to be broad in scope
18 in order to develop an evidentiary record regarding the public interest underlying utility
19 service to the Cornman Tweedy Property. The Remand ROO acknowledges this fact.⁸
20 Likewise, there can be no doubt that the Commissioners believed their unanimous
21 adoption of Gleason Proposed Amendment #3, based upon input from the Legal
22 Division, accomplished their objective consistent with the procedural due process
23 interest of AWC.

24 Notwithstanding the Commissioners' express intentions in Decision 69722, the
25 ALJ erroneously concluded that the Commissioners were without authority to remand
26 the case for a broad review of the public interest implications of utility service to the

27 ⁷ Gleason Proposed Amendment #3 prepared on July 19, 2007; Decision 69722 at p. 4, lines 1-28
(emphasis added).

28 ⁸ Remand ROO at FOF 153.

1 Cornman Tweedy Property, based upon a misplaced reliance on *James P. Paul Water*
2 *Company v. Arizona Corporation Commission*, 137 Ariz. 426, 671 P.2d 404 (1983)
3 ("*James P. Paul*"). Relying on *James P. Paul*, the ALJ erroneously concluded that the
4 Commission's review in this case is limited to whether AWC is "unable or unwilling to
5 provide water utility service upon receiving a *bona fide* request."⁹ However, *James P.*
6 *Paul* has no application in this case because the facts of *James P. Paul* are very—and
7 materially—different from the facts of this case.

8 **III. JAMES P. PAUL DOES NOT PREVENT THE COMMISSION FROM**
9 **DELETING THE CORNMAN TWEEDY PROPERTY FROM AWC'S**
10 **CC&N IF THE DELETION IS IN THE PUBLIC INTEREST.**

11 **A. James P. Paul is Not Applicable in this Case Because it is**
12 **Distinguishable.**

13 There are a number of important facts in this case which distinguish it from *James*
14 *P. Paul*. In its 1983 decision in *James P. Paul*, the Arizona Supreme Court defined the
15 criteria by which the Commission may delete territory from a CC&N. The *James P. Paul*
16 Water Company ("Paul Water Company") had been granted a CC&N to provide water
17 service to several sections of largely undeveloped land in Maricopa County, including
18 approximately 240 acres that were the subject of the case. Pinnacle Paradise Water
19 Company ("Pinnacle Paradise") held a CC&N to provide water service to an area
20 adjacent to the 240 acres, and Pinnacle Paradise filed a petition with the Commission to
21 delete the 240 acres from Paul Water Company's CC&N. Paul Water Company was not
22 providing water service to the 240 acres, nor had Paul Water Company constructed any
23 facilities to serve the 240 acres because no demand for service had been made by the
24 owner of the property. The owner of the 240 acres was also a 50% owner of Pinnacle
25 Paradise. Pinnacle Paradise had existing facilities in an area adjacent to the 240 acres,
26 and the company could have extended those facilities at a relatively low cost.¹⁰ The
27 Commission granted the deletion request of Pinnacle Paradise.

28 ⁹ Remand ROO at FOF 154.

¹⁰ *James P. Paul*, 137 Ariz. at 427-428, 671 P.2d at 405-406.

1 In the subsequent appeal, the Arizona Supreme Court held in favor of Paul Water
2 Company, ruling that the “public interest is the controlling factor in decisions concerning
3 service of water by water companies.”¹¹ In applying the public interest standard in
4 *James P. Paul*, the Supreme Court stated that “[o]nce granted, the certificate confers
5 upon its holder an exclusive right to provide the relevant service for as long as the
6 grantee can provide adequate service at reasonable rates.”¹² This language from *James*
7 *P. Paul* appears to provide the entire basis supporting the ALJ’s rejection of Cornman
8 Tweedy’s request for exclusion of the Cornman Tweedy Property.

9 The Arizona Supreme Court specifically distinguished *James P. Paul* from
10 another case which is more applicable to this case. In *Arizona Corporation Commission*
11 *v. Arizona Water Company*, 111 Ariz. 74, 523 P.2d 505 (1974) (“*Arizona Water*
12 *Company*”), AWC and R.J. Fernandez (doing business as Holiday Forest Water
13 Company (“Holiday Forest”)) filed competing applications for a CC&N to supply water
14 to a half section of land that was undergoing residential development. AWC was granted
15 the CC&N and Holiday Forest filed for reconsideration. In the ensuing remand
16 proceeding, the Commission rescinded AWC’s CC&N and gave it to Holiday Forest.
17 AWC appealed, the Superior Court vacated the Commission’s action, and the Court of
18 Appeals affirmed, holding that “evidence that the public interest would best be served by
19 the certification of [the competitor] in place of the Arizona Water Company is
20 insubstantial as opposed to the evidence offered by the Arizona Water Company and,
21 therefore . . . the record clearly supports the Superior Court’s conclusions.”¹³ The
22 Arizona Supreme Court quoted this language in *James P. Paul*, and then distinguished
23 *Arizona Water Company* from *James P. Paul*, stating:

24 *Arizona Water Co.* is distinguishable because it presented a challenge to the
25 Commission’s initial grant of a certificate of convenience and necessity.
26 Where a request for a certificate of convenience and necessity is made in
the first instance, the public interest is determined by comparing the

27 ¹¹ *Id.* at 429, 671 P.2d at 407.

28 ¹² *Id.*

¹³ *Arizona Water Company* at 77, 523 P.2d at 508.

1 capabilities and qualifications of competitors vying for the exclusive right
2 to provide the relevant service. The amounts of time and money
3 competitors must spend (at the consumers' ultimate expense) to provide
4 service become primary determinants of the public interest. But the instant
5 case did not involve a request for certification in the first instance. Instead,
6 it involved a request for a deletion in a certificate issued some seven years
7 earlier. Where a public service corporation holds a certificate for a given
8 area, the public interest requires that that corporation be allowed to retain
9 its certificate until it is unable or unwilling to provide needed service at a
10 reasonable rate.¹⁴

11 The *Arizona Water Company* case affirmed that the Commission may consider the
12 full panoply of public interest issues when considering an initial grant of a CC&N. By
13 comparison, where a CC&N was granted years earlier, as in *James P. Paul*, the
14 Commission's review is narrowly limited. The facts and circumstances of this case—
15 which is for all intents and purposes an initial grant of a CC&N—are more akin to
16 *Arizona Water Company* than *James P. Paul*. In Decision 66893, the Commission
17 granted a conditional CC&N extension, holding that if AWC did not comply with the
18 conditions within one year, the CC&N would be considered null and void without further
19 order of the Commission. When the deadline for compliance was one week away, AWC
20 applied for an extension of time in the very same docket, effectively a continuation of the
21 CC&N case. A lengthy procedural process, hearing and legal briefing ensued to
22 determine whether AWC had met the conditions and whether the requested extension of
23 time should be granted, which subsequently led to Decision 69722 and this remand
24 proceeding.

25 It is highly significant that Decision 69722: (i) remanded the case pursuant to
26 A.R.S. § 40-252 within the same docket; (ii) acknowledged that the previous proceeding
27 had been limited to relatively narrow issues; (iii) put AWC on notice that the Cornman
28 Tweedy Property could be deleted from the CC&N area covered by Decision 66893; and
29 (iv) directed that the remand proceeding be "broad in scope so that the Commission may
30 develop a record to consider the overall public interest underlying service to the

¹⁴ *James P. Paul* at 430, 671 P.2d at 408 (emphasis added).

1 Cornman property." This remand proceeding, as ordered by Decision 69722, is clearly a
2 continuation of Docket No. W-01445A-03-0559 in which the Commission has
3 considered AWC's application for a CC&N. The narrow legal standard set forth in
4 *James P. Paul*, which dealt with a CC&N granted seven years prior, does not and should
5 not apply here. To find otherwise would directly thwart the Commission's explicit order
6 for a remand proceeding, broad in scope, to consider the overall public interest
7 underlying utility service to the Cornman Tweedy Property. To find otherwise would
8 mean that this remand proceeding has been nothing more than a wild goose chase.

9 In this remand proceeding, AWC and Cornman Tweedy each had a full
10 opportunity to present evidence as directed by Decision 69722. The evidence presented
11 by Cornman Tweedy goes directly to the public interest and public policy considerations
12 ordered by Decision 69722, and should be considered and weighed by the Commission
13 in this proceeding. Specifically, the Cornman Tweedy witnesses presented evidence
14 regarding the need and necessity for utility service for the Cornman Tweedy Property,
15 the adverse effects of splitting a residential development between two water providers,
16 the costs/benefits and resource analysis of integrating water and wastewater services as
17 compared to stand-alone, water-only providers such as AWC, and other recent policy
18 initiatives of the Commission such as conservation. Notwithstanding the Commission's
19 express directive set forth in Decision 69722, the Remand ROO denies the Commission
20 the opportunity to consider this requested evidence under the guise of *James P. Paul*.

21 There are other important distinguishing factors between this case and *James P.*
22 *Paul* that must be considered. First, in *James P. Paul*, the Commission was asked to take
23 away an unconditional CC&N from Paul Water Company, which the company had held
24 for seven years, and give it to Pinnacle Paradise. In this case, there has been one
25 continuous proceeding regarding the area covered in Decision 66893, leading to
26 Decision 69722 and the Remand ROO. Moreover, since Cornman Tweedy filed its
27 Motion to Intervene in this docket on May 19, 2005, AWC has had constructive if not
28 actual notice that the Cornman Tweedy Property could be excluded from its CC&N.

1 Second, and perhaps more importantly, unlike *James P. Paul* there is no need and
2 necessity or request for water service for the Cornman Tweedy Property at this time.

3 Third, Cornman Tweedy has not asked the Commission to delete the CC&N area
4 and give it to AWC's competitor, as did Pinnacle Paradise in the *James P. Paul* case.
5 Rather, Cornman Tweedy has requested that its property be deleted from AWC's CC&N
6 to restore the *status quo ante*. At such time that a request for service is made, AWC will
7 have the opportunity, along with other interested applicants, to apply for the CC&N for
8 the Cornman Tweedy Property. At such time, the Commission can weigh all of the
9 public interest considerations relevant in the issuance of a CC&N.

10 Fourth, the evidence in the case showed that AWC will not be adversely impacted
11 by the deletion of the Cornman Tweedy Property.¹⁵

12 Finally, there is another critical detail fact that should not be ignored which
13 precludes the application of *James P. Paul* in this case. In framing the legal standard
14 applicable in CC&N deletion cases in *James P. Paul*, the Arizona Supreme Court stated
15 that:

16 . . . the public interest requires that the corporation be allowed to retain its
17 certificate until it is unable or unwilling to provide needed service at a
18 reasonable rate.¹⁶

19 In this case, the evidence is uncontroverted that water service is not needed at the
20 Cornman Tweedy Property, and much of Cornman Tweedy's pre-filed testimony
21 addressed this point. The *James P. Paul* standard specifically discusses "needed"
22 service. This is clearly not the situation that exists today with respect to the Cornman
23 Tweedy Property.

24 For all of these reasons, it was erroneous for the ALJ to rely upon *James P. Paul*
25 as the basis for denying Cornman Tweedy's request to exclude its property from the
26 CC&N of AWC.

27
28 ¹⁵ Rebuttal Testimony of Fred Goldman dated February 5, 2008, at p. 2, lines 21-28.

¹⁶ *James P. Paul* at 430, 671 P.2d at 308, note 3 (emphasis added).

1 B. In Adopting Decision 69722, Neither the Commission nor the
2 Legal Division Believed that James P. Paul Limited the
3 Commission's Ability to Delete the Cornman Tweedy Property
4 Based Upon the Public Interest.

5 The underlying record shows that the Commissioners and the Legal Division
6 clearly believed that the Commission has the authority to exclude the Cornman Tweedy
7 Property from AWC's CC&N if it finds that the exclusion is in the public interest. On
8 June 21, 2007, Cornman Tweedy filed exceptions to the ROO requesting that the
9 Commission exclude the Cornman Tweedy Property from the area conditionally granted
10 in Decision 66893. On June 22, 2007, former Chairman Gleason docketed Gleason
11 Proposed Amendment #1 which, if adopted, would have excluded the Cornman Tweedy
12 Property from the area conditionally granted in Decision 66893. As discussed above, at
13 the June 26-27, 2007 Open Meeting, there was extensive discussion among the
14 Commissioners, the ALJ, and the Legal Division regarding whether the Commission
15 could adopt Gleason Proposed Amendment #1 without subjecting the Commission to a
16 potential claim by AWC that the Commission had failed to provide procedural due
17 process. Specifically, the Commission discussed whether AWC had received adequate
18 legal notice that it could lose a portion of the CC&N area conditionally granted in
19 Decision 66893. As a result of that discussion, the Commissioners delayed its vote on
20 the ROO until the next Open Meeting so that the Commissioners could further confer
21 with the Legal Division and Hearing Division regarding an alternative or a revised
22 amendment that would eliminate any due process concerns.

23 On July 19, 2007, Chairman Gleason docketed Gleason Proposed Amendment #3
24 (quoted above), which was ultimately adopted and incorporated in Decision 69722. In
25 addition, on June 27, 2007, Chairman Gleason filed Gleason Proposed Amendment #2
26 which, if adopted, would have found that AWC did not comply with the conditions of
27 Decision 66893, thereby rendering Decision 66893 null and void, which would have
28 deleted the entire extension area from AWC's CC&N, not just the Cornman Tweedy

1 Property. Each of Chairman Gleason's three proposed amendments was discussed at the
2 June and July open meetings.

3 Cornman Tweedy arranged for the preparation of a transcript of the July 24, 2007,
4 Open Meeting relating to this docket.¹⁷ A reading of the transcript quickly shows that
5 the Commissioners and the Legal Division clearly believed that—depending upon the
6 evidence presented in the remand proceeding—the Commission had the authority to
7 exclude the Cornman Tweedy Property from AWC's CC&N at the end of the remand
8 proceeding. In an exchange between former Chief Counsel Kempley and former
9 Commissioner Hatch-Miller regarding the effect of Gleason Proposed Amendment #3,
10 Mr. Kempley explained that a deletion proceeding could immediately be held so that the
11 Commission could take into consideration the changed circumstances regarding the
12 Cornman Tweedy Property:

13 COM. HATCH-MILLER: . . .What -- what's the basis for carving out the
14 Cornman property?

15 MR. KEMPLEY: Mr. Chairman, Commissioner Hatch-Miller, I think
16 that -- that what's -- the amendment would propose to -- to do is essentially
17 to say that changed conditions, with respect to the Cornman property, may
18 warrant a reconsideration or a consideration of a deletion of that property
19 from what would now be fully Arizona Water Company's certificated area.

20 And you know, how those -- how those facts are developed in the hearing
21 on this matter is -- is something that we'll -- we'll only find out as the -- the
22 hearing process takes place.

23 But again, I think it kind of harkens back to the procedural posture of the
24 matter that was brought to you, which is that you had granted a conditional
25 certificate. The issue was, initially, whether or not to grant an extension of
26 time to meet the conditions, and -- and most importantly, and ultimately,
27 whether those conditions had been met.

28 And -- and as Judge Wolfe pointed out, the conditions weren't parsed out
by parcel in the proposed CC&N extension. So the finding of the -- the

¹⁷ A copy of the transcript was attached as Attachment "D" to the Reply of Cornman Tweedy 560, LLC to the Response Briefs of Arizona Water Company and Utilities Division Staff filed in this docket on July 17, 2009.

1 basic Recommended Opinion and Order is that the conditions have been
2 met.

3 With the Gleason Amendment Number 3, that finding is maintained, but it
4 points out that there may be some -- some concerns with respect to this
5 particular parcel, and proposes to examine the question of whether --
6 whether to subsequently delete that parcel based on facts that weren't part
7 of the initial decision.

8 COM. HATCH-MILLER: So I guess maybe thinking about it in the -- kind
9 of a little -- just a quick little bullet-point way, we're saying this company
10 satisfied the conditions. It can go ahead and continue -- continue to provide
11 service, extend -- extend service into this new CC&N area -- except that,
12 instead of waiting for 40-252 -- 40-2 -- in the -- in the later date and "X"ing
13 something out, we're going to say wait a minute. We want to -- we want to
14 reconsider whether or not the -- there was a real -- real need or real desire
15 for service to this one particular area. Or there may be other conditions, as
16 well, that need to be fleshed out more -- more completely.

17 MR. KEMPLEY: With -- with respect to this particular parcel of -- of land.

18 COM. HATCH-MILLER: Okay.

19 MR. KEMPLEY: I think -- I think, essentially, what -- what's happening,
20 as a result of this order with the Gleason Amendment, is that you're
21 immediately commencing a deletion proceeding as if the Cornman Tweedy
22 property had moved to be deleted from the CC&N. And that's the kind of a
23 proceeding that would take place --

24 COM. HATCH-MILLER: Um-hmm.

25 MR. KEMPLEY: -- in the 40-252 --

26 COM. HATCH-MILLER: Right.

27 MR. KEMPLEY: -- following this order.

28 COM. HATCH-MILLER: Right. Well, thank you Mr. Kempley. And Mr.
Chairman, I'm convinced that it's legal and property [sic] -- proper to adopt
your amendment, and I will support it.¹⁸

¹⁸ Transcript of Open Meeting at p. 15, line 25 through p. 18, line 13 (emphasis added).

1 Regarding Gleason Proposed Amendment #3, counsel for AWC made the
2 following comments to the Commissioners:

3 I completely agree with Mr. Kempley. Obviously, the applicant's desire
4 here would have the ROO as submitted. You heard substantial discussion
5 and give and take on that for hours at the last open meeting.

6 This is obviously, a carefully drafted and adroitly performed amendment
7 that ties together all of the concerns that were raised. And if we untie one
8 of the pieces of packing string, it all falls apart.

9 * * *

10 And Arizona Water Company, as much as it would like to have the ROO
11 entered as is, would accept this, and looks forward to working through the
12 process as the Commission would dictate under Amendment 3.¹⁹

13 It is error for the ALJ to now say that the very process that was painstakingly put
14 in place via Gleason Amendment #3, and accepted by Cornman Tweedy and AWC, is
15 precluded by *James P. Paul*. In fact, it was clearly the representations from counsel for
16 AWC and the Commission's Chief Counsel that the remand proceeding would allow the
17 Commission to consider the changed circumstances and broader public interest issues
18 underlying utility service to the Cornman Tweedy Property which led Chairman Gleason
19 to move Gleason Proposed Amendment #3, and not Gleason Proposed Amendment #1 or
20 Gleason Proposed Amendment #2. Had Chairman Gleason known that James P. Paul
21 would be applied to preclude the very review his amendment ordered, it is very likely
22 that he would have instead offered one of his other two amendments.

23 Finally, based upon the statements made by Chairman Gleason at the June 24,
24 2007 Open Meeting as set forth in transcript discussed above, there is no doubt that the
25 Commission was aware of *James P. Paul* but did not believe that the case precluded the
26 Commission from excluding the Cornman Tweedy Property from AWC's CC&N if the
27 Commission found that deletion was in the public interest. Understanding the procedural

28 ¹⁹ *Id.* at p. 9, line 17, through p. 10, line 9.

1 history of this case, and after specifically discussing *James P. Paul*,²⁰ Chairman Gleason
2 stated:

3 So we need to send this back to Hearing to establish a broader record, to
4 invite more intervenors to establish a more complete record, and to
5 ascertain if changes in the CC&N are in the public interest.²¹

6 For all of these reasons, *James P. Paul* does not preclude the Commission from
7 acting in furtherance of Decision 69722 to exclude the Cornman Tweedy Property from
8 AWC's CC&N based upon the facts and circumstances of this case. To do so is clearly
9 in the public interest, as discussed further below.

10 **IV. THE EVIDENCE SHOWS THAT THE PUBLIC INTEREST IS BEST**
11 **SERVED BY THE EXCLUSION OF THE CORNMAN TWEEDY**
12 **PROPERTY FROM AWC'S CC&N AT THIS TIME.**

13 **A. The Public Interest is Best Served When Customers Receive**
14 **Service from an Integrated Water and Wastewater Provider.**

15 The uncontroverted evidence presented by Cornman Tweedy in the remand
16 proceeding shows that the Commission has an express preference for integrated water
17 and wastewater providers over stand-alone water providers. In his direct testimony, the
18 late Mr. Jim Poulos testified as follows:

19 I believe the Commission must take into account the opportunity for
20 integration of water and wastewater services in order to "consider the
21 overall public interest underlying service to the Cornman property" as set
22 forth in Decision 69722. There is no doubt that integration of water and
23 wastewater services is very important to the Commission and an issue the
24 Commission is addressing at this time. In the Rulemaking I discussed
25 above, the Commission proposed and approved additions to Rule R14-2-
26 402 which address integration of water and sewer operations. At the Open
27 Meeting held January 15, 2008, Commissioner Mayes proposed two
28 amendments to Rule R14-2-402 and Commission Gleason proposed one
amendment, all three of which dealt with integration of water and
wastewater service, encouraging the use of reclaimed wastewater and
conserving groundwater. Each of the amendments passed on a 5-0 vote and
were incorporated in Decision 70128.

* * *

²⁰ *Id.* at p. 13, line 16, through p. 14, line 24.

²¹ *Id.* at p. 14, line 25, through p. 15, line 4.

1 In addition to the amendments adopted in the Rulemaking, in a 2007 article
2 entitled *Encouraging Conservation by Arizona's Private Water Companies:
3 A New Era of Regulation by the Arizona Corporation Commission*
4 published in the Arizona Law Review, 49 Ariz. L. Rev. 297 (2007),
5 Commissioner Mayes discussed the Commission's preference for integrated
6 water and wastewater providers, stating:

7 *In recent months, the Commission has issued decisions
8 indicating a preference that new subdivisions be served,
9 where possible, by integrated water and wastewater
10 companies. These integrated utilities help to achieve
11 economies of scale, encourage conservation efforts, and
12 facilitate the use of effluent for golf course irrigation,
13 ornamental lakes, and other water features. The concept of
14 integrated wastewater and water companies was approved by
15 the 1999 Commission Water Task Force, a working group
16 comprised of Commission Staff, the Residential Utility
17 Consumer Office ("RUCO"), ADEQ, ADWR, and water
18 company stakeholders. Though the Task Force's policy
19 proposals have never been formally adopted by the
20 Commission, the integrated water and wastewater model has
21 been explicitly favored in several recent decisions.*

22 * * *

23 *Companies competing for the right to serve some of the
24 state's fastest growing areas are advantaged when they
25 present an integrated approach to the Commission, thus
26 allowing Commissioners the opportunity to mandate the use
27 of effluent from the moment the service area is created.
28 (footnotes omitted).*

* * *

From these statements and the proposed rule revisions in the Rulemaking, it is clear that the Commission is very interested in the public policy of integrated water and wastewater providers. An evaluation of the opportunity for integration of water and wastewater services in this remand proceeding is entirely consistent with "the overall public interest underlying service to the Cornman property" as set forth in Decision 69722.²²

Additionally, in Mr. Paul Hendricks' direct testimony on behalf of Cornman Tweedy, he describes the operational benefits that integrated water and wastewater

²² Rebuttal Testimony of Jim Poulos dated February 5, 2008, at p. 7, line 12 through p. 10, line 10.

1 systems provide as compared to stand-alone water systems such as AWC's system.
2 These operational benefits include the following:

- 3 • Integration enables the water provider to assist the sewer provider in
4 collecting past due balances;
- 5 • Integration promotes the public policy of managing groundwater, a
6 precious resource;
- 7 • Integration provides greater flexibility in designing treatment
8 systems and addressing waste streams which promotes more cost-
9 effective compliance with environmental standards;
- 10 • Integration provides enhanced security;
- 11 • Integration improves customer convenience by providing one-stop
12 shopping;
- 13 • Integration and consolidation create efficiencies;
- 14 • Integrated systems save money in the design and construction
15 phases; and
- 16 • Integrated systems are less expensive to operate.²³

17 Mr. Hendricks, an expert in water and wastewater systems with decades of
18 experience,²⁴ concluded his testimony by stating:

19 Based upon my experience and involvement with respect to both integrated
20 and stand-alone water and wastewater systems, as well as for the reasons
21 described in my testimony above, given a choice, an integrated water and
22 wastewater provider is always preferable to two separate stand-alone
23 providers and should be encouraged whenever possible.²⁵

24 The evidence presented by Cornman Tweedy regarding integration is completely
25 consistent with the public interest considerations expressed by Chairman Mayes and the
26 Commission as described above. Given (i) Cornman Tweedy's objection to having its
27 property included in the CC&N of a water provider that is not an integrated provider, and
28 (ii) the lack of a need and necessity for water service, as discussed below, there is no

²³ Direct Testimony of Paul S. Hendricks dated January 4, 2009, at p. 4, line 14 through p. 15, line 9.

²⁴ *Id.* at p. 1, lines 7-22.

²⁵ *Id.* at p. 15, lines 6-9.

1 compelling reason whatsoever for the Cornman Tweedy Property to be included in
2 AWC's CC&N at this time. Rather, at such time as the Cornman Tweedy Property is
3 developed and there is a demonstrated need and necessity for service, the Commission
4 will have "the opportunity to consider the overall best interests of the Cornman area and
5 of the public" consistent with the Decision.

6 **B. There Is No Current Need and Necessity for Water Service for**
7 **the Cornman Tweedy Property.**

8 The Commission asked the parties to address whether there is a current need and
9 necessity for water service for the Cornman Tweedy Property. Without any doubt, there
10 is not. Mr. Poulos testified:

11 [T]he business plan for the EJ Ranch Property changed 180 degrees
12 since December 2004. Cornman Tweedy purchased the EJ Ranch
13 property with the plan of developing the property in a strong real estate
14 market, and Robson commenced the process of entitling the property.
15 However, Robson did not anticipate the tremendous appreciation in the
16 value of the property which occurred after the acquisition, nor did Robson
17 anticipate the dramatic decline in the demand for new residential housing
18 which commenced in late 2005 and continues today. As a result of these
19 changed circumstances, Robson ceased further development activities
20 except for certain pending entitlement activities that could be
21 expeditiously completed. Robson has no plans to develop the EJ Ranch
22 property. The property has been indefinitely shelved. There is no need
23 and necessity for water service.²⁶

24 **C. Cornman Tweedy Does Not Wish to Have Its Property Included**
25 **in AWC's CC&N and There Is No Request for Utility Service for**
26 **the Cornman Tweedy Property.**

27 Cornman Tweedy does not wish to have its property included in AWC's CC&N
28 and there is no pending request for water service for the Cornman Tweedy Property.
These facts are: (i) not in dispute between the parties; (ii) recognized by the Commission
in the express language of Decision 69722; and (iii) two of the very reasons the
Commission ordered the remand proceeding. For more than five years now, and well
before the issuance of Decision 69722, Cornman Tweedy has assiduously and

²⁶ Direct Testimony of Jim Poulos dated January 4, 2008, at p. 10, lines 15-26.

1 consistently taken the position in this docket that its property should not be included in
2 AWC's CC&N. Moreover, Cornman Tweedy asserts that it is not good public policy to
3 allow a water provider to hold a CC&N for property where the property owner has not
4 requested water service. When asked if Cornman Tweedy has ever requested water
5 service from AWC, Mr. Poulos testified:

6 No. In fact since April 2005, Cornman Tweedy has been working to get the
7 Cornman Tweedy Property excluded from AWC's CC&N. Before that, the
8 Dermer Trust (to which Cornman Tweedy is a successor) began working to
9 get its property excluded from AWC's CC&N in April 2004. This case
10 does not only involve a lack of a request for service, but also involves
11 affirmative and relentless efforts to get the Cornman Tweedy Property
12 excluded from AWC's CC&N.²⁷

13 This is another of the many public interest reasons why the Commission should
14 exclude the Cornman Tweedy Property from AWC's CC&N. The Commission should
15 always consider the wishes of the property owner as one of the relevant public interest
16 factors when making decisions regarding CC&Ns, and should require that there be a
17 *bona fide* request for service from the affected property owner.

18 **D. The Public Interest Is Not Served by AWC Holding a CC&N**
19 **for the Cornman Tweedy Property.**

20 Cornman Tweedy has presented evidence identifying a number of compelling
21 reasons why it would not be good public policy to permit AWC to hold the CC&N for
22 the Cornman Tweedy Property, and has presented evidence in this case addressing each
23 of these public policy considerations. They include:

- 24 • The premature grant of a CC&N without a request for service will
25 often contradict the desires of the landowner, especially where the
26 property is being assembled over time for inclusion in a master-
27 planned development, which is the ultimate plan for the Cornman
28 Tweedy Property;²⁸

²⁷ *Id.* at p. 13, lines 19-25.

²⁸ Poulos Direct at p. 14, lines 4-7.

- 1 • It can lead to a situation where, such as in this case, a single
- 2 development is potentially split between two water providers;²⁹
- 3 • It can foreclose desirable options for the landowner such as selecting
- 4 an integrated water and wastewater provider. AWC is not an
- 5 integrated water and wastewater provider and Cornman Tweedy
- 6 would prefer service from an integrated provider;³⁰
- 7 • It prevents the premature foreclosure of the full range of options that
- 8 may be considered by the Commission;³¹ and
- 9 • The Commission now routinely denies applications for new CC&Ns
- 10 and extensions of existing CC&Ns where there is no request for
- 11 service and has recently amended its regulations to require proof that
- 12 service has been requested.³²

13 The pre-filed direct and rebuttal testimonies and exhibits presented by Cornman
14 Tweedy go directly to the public interest considerations applicable to whether AWC
15 should continue to hold the CC&N for the Cornman Tweedy Property and should be
16 considered and weighed by the Commission in this case. Specifically, the Cornman
17 Tweedy witnesses have presented evidence relating to the lack of a need and necessity
18 for service, the negative effects of splitting a residential development between two
19 providers, the cost-benefit and resource analysis of integrating water and wastewater
20 service versus stand-alone water providers, and other recent and important policy
21 initiatives of the Commission. Moreover, there has been no development (nor will there
22 be any development in the foreseeable future) of the Cornman Tweedy Property, and
23 AWC will not be prejudiced or harmed in any way by the exclusion of this relatively
24 small number of acres from its CC&N.³³ In fact, AWC will still have an opportunity to
25 apply to serve the Cornman Tweedy Property in the future when and if service is
26 requested.

27 ²⁹ *Id.* at lines 7-9; *see also* Direct Testimony of Fred E. Goldman, p. 3, line 16 through p. 4, line 23.

28 ³⁰ *Id.* at lines 10-11; *see also* Direct Testimony of Paul S. Hendricks at p. 4, line 14 through p. 15, line 9.

³¹ *Id.* at lines 12-15.

³² *Id.* at lines 16-28.

³³ *See* discussion in Rebuttal Testimony of Fred Goldman dated February 5, 2008 at p. 1 line 14 through p. 2, line 28.

1 Finally, because circumstances have materially changed since the Commission
2 initially and conditionally issued the CC&N to AWC for the Cornman Tweedy Property,
3 the Commission is entitled to take such changed circumstances into consideration in this
4 remand proceeding, as acknowledged by former Chief Counsel Kempsey. In this case,
5 the evidence showed that there are at least five material changes in circumstances that,
6 from a public policy standpoint, warrant the exclusion of the Cornman Tweedy Property
7 from AWC's CC&N:

- 8 • Since the issuance of Decision 66893 in 2004, Cornman Tweedy
9 acquired the contiguous tract of 1,138 acres within the Conditional
10 Extension Area which is part of a larger 2,344-acre tract that may
11 one day be developed as the EJ Ranch master planned
12 development. Cornman Tweedy did not have an opportunity to
13 participate in this case prior to the Commission's approval of
14 Decision 66893.³⁴
- 15 • The prior owners of the 240-acre Florence Country Estates property
16 initially requested water service from AWC, but Cornman Tweedy
17 opposed water service from AWC. The balance of the 1,138-acre
18 Cornman Tweedy Property never made a request for water service to
19 AWC.³⁵
- 20 • While the prior owners of the 240-acre Florence Country Estates
21 property had plans to develop the property, Cornman Tweedy never
22 intended to use those plans and, in fact, has indefinitely shelved
23 plans to develop EJ Ranch (including the former Florence Country
24 Estates property) because of the severe downturn in the real estate
25 market and the economy.³⁶
- 26 • Since issuance of Decision 66893, Picacho Water Company
27 obtained a CC&N extension in Decision 67670 (March 9, 2005) to
28 provide water service in the southern half of EJ Ranch, which is
contiguous to the Cornman Tweedy Property, and could serve the
Cornman Tweedy Property in the future upon receipt of a request for
service and approval by the Commission. Decision 67670 also
granted a CC&N extension to Picacho Sewer Company for all of
EJ Ranch, including the 1,138-acre Cornman Tweedy Property.³⁷
Therefore, the Cornman Tweedy Property could be served in the

³⁴ Closing Brief of Cornman Tweedy 560, LLC, dated September 15, 2006, at p. 6 lines 25-28 through p. 7, lines 1-2; See also Poulos Direct, p. 6, line 15 through p. 8, line 8.

³⁵ *Id.* at p. 7, lines 3-5; see also Poulos Direct at p. 6-lines 15 through p. 8, line 8.

³⁶ *Id.* at lines 6-9; see also Poulos Direct at p. 10, lines 15-26.

³⁷ *Id.* at lines 10-15; see also Commission Decision 67670 (March 9, 2005).

1 future by an integrated water and wastewater provider which was not
2 an option at the time the Commission issued Decision 66893. AWC
3 is not an integrated provider.

- 4 • The Commission no longer grants CC&Ns to water providers
5 without a request for service from the property owner.³⁸

6 None of the above-cited changed circumstances was controverted by AWC.

7 **V. CONCLUSION.**

8 The evidence presented by Cornman Tweedy in this remand proceeding clearly
9 demonstrates that:

- 10 1. The public interest is best served by a Commission preference for the
11 multiple benefits of integrated water and wastewater providers over the
12 limitations of stand-alone water providers;
- 13 2. There is no current need and necessity for water service for the Cornman
14 Tweedy Property;
- 15 3. Cornman Tweedy does not wish to have its property included in AWC's
16 CC&N and there is no request for utility service for the Cornman Tweedy
17 Property; and
- 18 4. The public interest is best served by excluding the Cornman Tweedy
19 Property from AWC's CC&N at this time.

20 For all of the foregoing reasons, Cornman Tweedy requests that the Commission
21 exclude the Cornman Tweedy Property from AWC's CC&N.

22 RESPECTFULLY submitted this 8th day of December, 2010.

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25 

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³⁸ Poulos Direct at p. 14, lines 16-28.

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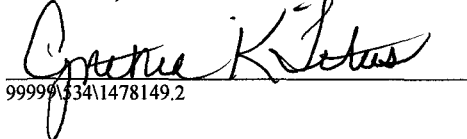
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